Tan See King & Anor v Anata Knitting Industry (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–2743 OF 2009
LOW HOP BING, ABDUL WAHAB PATAIL AND ANANTHAM KASINATHER JJCA
26 JANUARY 2012

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Companies and Corporations — Charges — Fixed charge — Company's motor vehicles in debenture subject to fixed charge in bank's favour — Whether company ceased to have title or interest in vehicles — Whether purported buyer of vehicles from company not bona fide purchaser for value and did not acquire good title — Whether company could not deal with assets forming subject matter of fixed charge

D

The respondent had created debentures in favour of a bank in the course of its business. Included in the debentures were 10 motor vehicles ('the vehicles') which were subject to a fixed second charge in the bank's favour. When the bank appointed receivers and managers ('R&M') over the respondent's assets the R&M found the vehicles were in the possession of the appellants, second-hand car dealers, who claimed they had purchased them from the respondent. The appellants refused to give up possession of the vehicles claiming they had completed the purchase of the vehicles before the R&M were appointed.

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Held, dismissing the appeal with costs:

(1) The respondent could not validly sell the motor vehicles which were the subject matter of a fixed charge under the debenture. Upon the creation of the debenture in the bank's favour, the vehicles which formed the subject matter of the second fixed charge were encumbered with the interest of the chargee bank and consequently, the respondent had no interest or title that could be passed by it to the appellants (see para 4).

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(2) The second fixed charge expressly included the vehicles, including in some cases, identifying them by the registration numbers, and resulted in their absolute assignment to the debenture holder. The respondent had no rights to sell the vehicles and the appellants did not derive good title following their purported purchase (see paras 5—6).

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(3) The appellants were not bona fide purchasers for value particularly since the respondents had registered the debentures with the Companies Commission which sufficed to serve as sufficient notice of the existence of the fixed charge (see paras 7 & 11).

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(4) A company was only permitted to deal with property forming the

subject-matter of a floating charge pending crystallisation of the floating charge into a fixed charge in the ordinary course of business. In the case of the assets of a company forming the subject matter of a fixed charge, the company was not entitled to deal with the same at all (see para 10).

[Bahasa Malaysia summary

Responden telah mewujudkan debentur-debentur memihak bank dalam urusan perniagaannya. Termasuk di dalam debentur-debentur tersebut adalah 10 kenderaan ('kenderaan tersebut') yang mana tertakluk kepada caj kedua yang ditetapkan memihak bank. Apabila bank melantik pengurus dan penerima ('P & P') ke atas aset responden, P & P mendapati yang kenderaan tersebut adalah dalam milikan perayu-perayu, ejen kereta terpakai, yang menuntut bahawa mereka yang telah membeli kenderaan tersebut daripada responden. Perayu-perayu menolak untuk memberi milikan kenderaan tersebut dengan menuntut bahawa mereka telah selesai membayar kenderaan tersebut sebelum P & P dilantik.

Diputuskan, menolak rayuan dengan kos:

(1) Responden tidak dapat menjual kenderaan tersebut dengan sah yang mana adalah perkara caj tetap di bawah debentur. Atas penciptaan debentur dengan memihak bank, kenderaan yang membentuk perkara caj tetap kedua telah dibebankan dengan kepentingan bank gadaian dan akhirnya, responden tidak mempunyai kepentingan atau hak milik yang boleh diserahkan olehnya kepada perayu-perayu (lihat perenggan 4).

(2) Caj tetap kedua secara nyata termasuk kenderaan tersebut, termasuk dalam beberapa kes, mengenal pasti mereka melalui nombor pendaftaran, dan mengakibatkan penyerahakkan mutlak kepada pemegang debentur. Responden tidak mempunyai hak untuk menjual kenderaan tersebut dan perayu-perayu tidak dapat hakmilik bagus berikutan pembelian mereka tersebut (lihat perenggan 5–6).

(3) Perayu-perayu bukan pembeli-pembeli bona fide untuk nilai terutamanya memandangkan responden-responden telah mendaftarkan debentur tersebut dengan Suruhanjaya Syarikat yang mencukupi untuk menyerahkan sebagai notis kewujudan caj tetap (lihat perenggan 7 & 11).

(4) Syarikat hanya dibenarkan untuk berurusan dengan hartanah yang membentuk perkara caj terapung sementara menunggu caj terapung tersebut membentuk kepada caj tetap di dalam urusan perniagaan yang biasa. Berkaitan aset syarikat membentuk perkara subjek caj tetap, syarikat tidak berhak berurusan dengannya sama sekali (lihat perenggan 10).]

Notes

For cases on fixed charge, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 81–82.

Cases referred to

Illingworth v Houldsworth [1904] AC 355, HL (refd)

Malaysian International Merchant Bankers Bhd v Highland Chocolate and Confectionery Sdn Bhd & Anor [1997] 1 MLJ 102; [1998] 4 CLJ Supp 32, HC (refd)

United Malayan Banking Corporation Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (in liquidation) & Anor [1986] 1 MLJ 75 (refd)

Appeal from: Originating Summons No 24(L) 269 of 2006 (High Court, Muar)

Mohd Fadzaial bin Ab Latiff (Chriss Lee & Partners) for the appellant.
Tan Koon Hew (KH Tan & Co) for the respondent.

Anantham Kasinather JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] The respondent was at all material times the registered owner of motor vehicles bearing the following number:

(a) JHE 9707

(b) WFA 1578

(c) JFQ 9707

(d) JFH 7446

(e) JBX 9707

(f) JCJ 7079

(g) JCC 7079

(h) JER 817

(i) JBR 4152

One other motor vehicle bearing registration No JFS 9 although not registered in the name of the respondent, nevertheless was included in the debentures created by the respondent in favour of Bank Bumiputra Commerce Bank Bhd ('the chargee bank').

[2] In the course of its business, the respondent executed numerous debentures on 1 December 1988, 31 July 1991, 18 December 1999, 31 July 1991, 7 August 1993 and 22 February 1995 in favour of the chargee bank. The existence of these debentures was duly recorded with the Companies Commission of Malaysia save for the debenture dated 22 December 2002 which was intended to consolidate in one document all the earlier debentures. It is not in dispute that all the motor vehicles were the subject matter of a fixed second charge under the debentures created by the respondents in favour of the chargee bank.

[3] On 17 January 2006, the debenture holder appointed receivers and managers ('R&M') over the assets of the respondent including the motor vehicles of the respondent. The R&M, however, was unable to take possession of the motor vehicles as the motor vehicles were in the possession of the appellant. The appellants refuted the claim for possession of the motor vehicles by the respondent on the purported ground that they had purchased these motor vehicles following the offer for sale of the same by one Mr Teo Seng Ong, a director of the respondent. According to the appellants, as second hand car dealers, they had merely accepted the offer of Mr Ong. It was also the case of the appellants that their purchase of the aforesaid motor vehicles was completed a few days before the appointment of the R&M.

ISSUES

Whether the respondent can sell the motor vehicles and confer a good title to the same on the appellants (first issue).

Whether the appellants are bona fide purchasers for value (second issue).

First issue

[4] In our judgment, the short answer to the first issue is that the subject matter of the fixed charge in the debenture such as the motor vehicles in this case cannot be validly sold by the appellants. The rationale for this proposition is that upon the creation of the debenture in favour of the chargee bank, the motor vehicles of the respondent which formed the subject matter of the second fixed charge are encumbered with the interest of the chargee bank and consequently, the respondent had no interest or title that could be passed by it to the appellants. The effect of the second fixed charge expressly includes all the motor vehicles including in some cases identifying them by the registration numbers resulted in the absolute assignment of these motor vehicles to the debenture holder. Hence, the absence of any rights in the respondent to effect a sale of them. This principle of law is best illustrated in the passage in the judgment of Lord Macnagthen in the case of *Illingworth v Houldsworth* [1904] AC 355, where His Lordship said:

> I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

In the same case, Earl of Halsbury LC described the effect of a fixed charge in the following terms:

> Of course, if there was an absolute assignment of them which fixed property in them, the company would have no right to touch them at all. The minute after the execution of such an assignment they would have no more interest in them, and would not be allowed to touch them, whereas as a matter of facts it seems to me that the whole purport of this instrument is to enable the company to carry on its business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if this deed had not been executed at all. That is what we mean by a floating security.

[5] Justice Abdul Malik J, (as His Lordship then was) had occasion to quote and follow the pronouncements of Lord Macnaghten in the case of *Illingworth v Houldsworth* (see His Lordship's judgment in *Malaysian International Merchant Bankers Bhd v Highland Chocolate and Confectionery Sdn Bhd & Anor* [1997] 1 MLJ 102 at p 119; [1998] 4 CLJ Supp 32 at p 49).

[6] Since the respondent was incapable of dealing with the motor vehicles, it follows that the answer to the first issue is that the appellants did not derive good title to the motor vehicles following the purported purchase of the same from the respondent.

Second issue

[7] With respect, once it is accepted that the respondent had no title to pass, the question of the appellants being bona fide purchasers for value does not arise particularly since the respondents had registered the debentures with the Companies Commission. On the particular facts of this case, we are satisfied that this registration of the earlier debentures with the Companies Commission sufficed to serve as sufficient notice of the existence of the fixed charge in favour of the respondent.

[8] The thrust of the submission of counsel for the appellants was that since they purchased the motor vehicles before the appointment of the R&M, they qualified as bone fide purchaser for value. Counsel for the appellants also

submitted that as a bona fide purchaser for value, their interests to the motor vehicles prevailed over those of the respondent since their purchase of the motor vehicles was completed before the appointment of the R&M. Counsel for the appellants then cited the following passage:

> Paragraphs 879 and 880 were quoted to show that the appointment of a Receiver is one of the events which cause floating charge to crystallize. As regards all the property comprised in the security over which the Receiver is appointed, the Director's power are of necessity paralysed from that point on words. Whether the Receiver was acting as agent for the Debenture holder or for the Company depended upon the precise terms of his appointment. It was pointed out that power of the secured creditor to appoint a Receiver can be exercised after the Company has gone into liquidation.

in the judgment of Shankar J (as His Lordship then was) in the case of *United Malayan Banking Corporation Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (in liquidation) & Anor* [1986] 1 MLJ 75 ('UMBC') in support of this proposition.

[9] With respect, in our opinion, the passage in the judgment of Justice Shankar is not an authority for the proposition contended for by counsel for two reasons. First, the issue before the court in UMBC concerned the more difficult question of the status of the properties of the company which are the subject matter of a debenture upon the company being wound up. This is not the case here. Secondly, this submission of counsel, with respect, is due to a misapprehension of the difference between a fixed and a floating charge. Properties forming the subject matter of a floating charge can be sold in the ordinary course of business. However, this is not the case with properties forming the subject matter of a fixed charge, as is the case here. The distinction between a fixed charge and a floating charge have already been highlighted in para 5 of this judgment by reference to the pronouncements of Lord Macnagthen in *Illingworth v Houldsworth.*

[10] From the pronouncements of Lord Macnagthen and Earl of Halsbury LC it is evident that a company is only permitted to deal with property forming the subject matter of a floating charge pending crystallisation of the floating charge into a fixed charge in the ordinary course of business. In the case of the assets of the company forming the subject matter of a fixed charge, the company is not entitled to deal with the same at all. To the extent that the motor vehicles were the subject matter of the second fixed charge in favour of the chargee bank, on the facts of this case the respondent was incapable through the actions of Mr Teo from conferring a good title to the motor vehicles upon the appellants.

[11] For this reason, the answer to the second issue is that the appellants are not bona fide purchasers for value of the motor vehicles.

[12] Accordingly, we dismiss the appeal and order the appellant to pay costs of RM10,000 to the respondent. We order the deposit to be paid to the respondent towards account of fixed costs.

Appeal dismissed with costs.

Reported by Ashok Kumar